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in the

Supreme Court

of the

United States

October Term, 1978

NO. 78-1244

VALERIE FREDERICKS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 15, 1978.[1]

[1]The style of the case in the Fifth Circuit read as follows: *United States of America, Plaintiff/Appellee v. Valerie Fredericks, Craig Calver, and Leon Perry, Defendants/Appellants; No. 77-5802.*

CITATIONS TO OPINIONS BELOW

The opinion of the United States Magistrate is unreported and is printed in Appendix A hereto *infra*, p. 1 . The opinion of the District Court, is unreported and is printed in Appendix A hereto *infra*, p. 6 . The opinion of the Circuit Court of Appeals, printed in Appendix A hereto *infra*, p. 9 , is reported in 586 F.2d 470.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 15, 1978, *infra*. Rehearing was denied on January 11, 1979, printed in Appendix A hereto, *infra*, App. 33. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether, when abusive, coercive tactics are used by government agents against a party in order to elicit incriminating testimony against a second party, that second party has *standing* to cite those illegal police tactics as an infringement against his constitutional guarantees sufficient to warrant his right to assert them in a motion to suppress the first party's testimony relative to himself (the second party).

STATEMENT

The Petitioner/Defendant, Valerie Fredericks, was charged with Co-Defendants Leon Perry and Craig Calver in an indictment filed by the Grand Jury on August 25, 1977 with conspiracy to distribute methaqualone hydrochloride and possession with intent to distribute methaqualone hydrochloride. The indictment was based on the following factual situation.

On August 2, 1977, two narcotics agents arrested Leon Perry and Craig Calver in the latter's apartment. After Perry and Calver had been placed under arrest, the Petitioner, Valerie Fredericks and unindicted Co-Conspirator, Robin Ehrlich were inticed into Calver's apartment. Miss Ehrlich was immediately separated from all of the others present in the apartment and was interrogated by the agents. The actions of the agents were fraught with illegalities. First, Miss Ehrlich was questioned without ever having had her *Miranda* rights read to her.

Second, the agents were so threatening and coercive in their tactics that Miss Ehrlich responded by succumbing to their questions and psychological brutality with tears and volunteering incriminating information as to the the Petitioner/Defendant, Valerie Fredericks, thinking that to do so would get herself and her boyfriend, Leon Perry, out of any trouble. So intimidated and bullied by the agents was Miss Ehrlich that she agreed to grant them access to Leon Perry's apartment. The Defendant, Leon Perry's Motion to Suppress the evidence seized from that illegal search and seizure was *granted*.

However, the Petitioner/Defendant Valerie Fredericks' Motion to Suppress the testimony of Robin Ehrlich obtained illegally and subsequently used against her was denied on the basis that the moving defendant lacked standing.

By affirming the District Court, the Fifth Circuit is in direct conflict with this Court's opinion in the *United States v. Ceccolini*, (1978) 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268.

REASONS FOR GRANTING THE WRIT

1. The decision in the court below in the instant case is directly in conflict with the decision of this Court in *United States v. Ceccolini, supra*. Briefly, the facts in *Ceccolini*, were as follows: A police officer discovered an envelope containing money and policy slips inside Defendant Ceccolini's flower shop. Same was discovered through the means of an illegal search and seizure. Upon said discovery, Officer Biro (discovering policeman) asked the Defendant's employee, Lois Hennessey, who the envelope belonged to. As a direct result of Miss Hennessey's response, the envelope was reported to the F.B.I. who initiated an investigation into the matter some four months later. Six months after the initial interrogation by the F.B.I., Ceccolini was called before a Grand Jury and at that time denied any knowledge regarding the envelope. Miss Hennessey was also called before the Grand Jury and her testimony, supporting her earlier statements, conflicted directly with that of Ceccolini. Following the statements in front of the Grand Jury an indictment was handed down and Miss Hennessey was called as a key witness at the trial of the Defendant. After a guilty verdict was rendered against Ceccolini, the District Court granted the Defendant's Motion to Suppress Miss Hennessey's testimony and set aside the verdict.

It is made clear by this Court's recitation of the facts that the District Court's decision to grant Ceccolini's Motion to Suppress the testimony of Hennessey after the guilty verdict was made because Hennessey first came directly to the attention of the government as the result of an illegal search and the government had not sustained its burden of showing that Hennessey's testimony definitely would have been obtained without the illegal search. Contrasting that factual pattern with the facts in the case *sub judice*, the District Court was in error in not granting Petitioner's Motion to Suppress Robin Ehrlich's testimony because, as in *Ceccolini*, Robin's statements as well as Robin herself came to the attention of the government as the result of illegal police conduct and interrogation, and, further, the government had not sustained its burden of showing that Ehrlich's testimony definitely would have been obtained without the illegal activity. Hence, the Fifth Circuit's affirmance of the District Court's decision blatantly goes against the policy emminating from *Ceccolini*.

In *Ceccolini*, it is clear that the Second Circuit's affirmance of the suppression of Hennessey's testimony was, by implication, a ruling that Ceccolini had sufficient standing to move to suppress the testimony of Hennessey based on the fact that her testimony was illegally obtained (ie: as the result of an illegal search). And, while this Court ultimately ruled that Hennessey's testimony should have been allowed in, it did so on other grounds. In other words, the High Court's opinion never denies that had the original taint not sufficiently dissipated, Ceccolini would have had the requisite standing to move to suppress Hennessey's statements.

In its review of the Second Circuit's decision, this Court held, as to the issue of extending the exclusionary rule to persons other than the ones subjected to the il-

legal search that an essentially important element is whether or not the testifying witness is coming forward voluntarily. In evaluating the standards of application of the exclusionary rule to live-witness testimony in light of the public policy of bringing forth all evidence which exposes the truth regarding alleged criminal activity-versus-a per se or 'but for' rule that would make inadmissable any evidence, whether tangible or live-witness testimony, that came to light via original illegal policy conduct, this Court opines:

> We are first impelled to conclude that the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application. (*Ceccolini*, at 1060)

This Court goes on to discuss that where a witness, although initially discovered via illegal means, comes forward of his *own free will* and testifies freely and voluntarily, that would be sufficient to dissipate any original taint. Stated conversely, then, a witness, first discovered through illegal means (as here, where Robin was deceitfully coaxed into Calver's apartment by the Government agents for what she thought was a party) and who thereafter unwillingly makes statements (ie: again, as here, where Robin was threatened and psychologically manipulated into giving damaging testimony), the original taint does not so dissipate as to make her testimony admissable. Going one step further, if Ceccolini had had standing to suppress Hennessey's testimony because the taint had *not* so dissipated then too, did your Respondent/Defendant, Valerie Fredericks, have the requisite standing to suppress Robin's testimony.

Continuing then with this Court's opinion as to what is required in order to suppress a witness' testimony, this Court stated that the link between the illegality and the testimony must be straight and uninterrupted:

> In short, since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required. (*Ceccolini*, at 1061).

In *Fredericks*, there is no question that the link is direct. The illegality regarding the obtaining of Robin Ehrlich's testimony occurred when: (1) the policemen began questioning Ehrlich without giving her *Miranda* warnings; and (2) Ehrlich responded, giving statements to the agents under brutal, threatening conditions. There was absolutely *no* break in the chain of causation.

Clearly, this "chain of causation" was one of the basic factors upon which this Court made its determination that the holding of the Second Circuit in *Ceccolini* had to be reversed. Quoting from this Court's opinion:

> We hold that the Court of Appeals erred in holding that the degree of attenuation was not sufficient to dissipate the connection between the illegality and the testimony. The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority. . . (*Ceccolini*, at 1062).

Had Hennessey's statements been elicited as a *direct result* of the illegality, it follows that this Court

would have held that they were properly the subject of suppression.

There, then, is the final conflict between this Court's decision and the decision in the Fifth Circuit. Hennessey's testimony, as decided by this Court, should have been allowed into evidence over Ceccolini's objections because of three factors that were present (1) the degree of attenuation was sufficient to dissipate the connection between the illegality and the testimony; (2) the testimony by the witness was given of her own free will; and (3) there was no evidence whatsoever that the initial illegality (the initial illegal search by policeman Biro) was conducted with the intent of finding a willing and knowledgeable witness to testify against Ceccolini. (It should be pointed out that the direct opposite of all three factors is present in *Fredericks*.)

Basing its decision on these three elements, this Court concluded that silencing Hennessey (by making the exclusionary rule applicable as to her) would very likely have a negligible deterrent effect. The same cannot be true in the *Fredericks'* case. If this Court determines that heavy-handed and coercive police tactics cannot be used so as to obtain testimony for the government because the use of such means is repugnant to our Constitution, the deterrent effect on similar police activity in the future would be significant.

Relying on the three factors used by this Court in determining that Hennessey's testimony should have been allowed into evidence, your Petitioner would now examine the decision of the Fifth Circuit and would conclude that because none of the three factors present in *Ceccolini* are present in *Fredericks* there is a direct con-

flict between this Court's decision and that of the Fifth Circuit.

It was conceded by the Circuit Court in *Fredericks*, that:

> Robin Ehrlich was lead into a separate room and, according to her uncontroverted testimony, subjected to *threatening and heavy handed interrogation* concerning the wereabouts of the quaaludes and whether she used drugs. As several government agents later testified, she was extremely upset that her boyfriend, Leon Perry had been arrested and, presumably, that she too was being detained . . . Ehrlich then admitted that the quaaludes were in the apartment that she shared with Perry and that they had been brought there in a suitcase by Valerie Fredericks. Subsequent testimony given by the various government agents was inconclusive concerning whether Ehrlich had been given any *Miranda* warnings prior to this interrogation, even though she was, according to one officer's testimony, under arrest and it was manifestly clear to all, including Ehrlich herself, that she was not free to lea e. (*Fredericks*, at 1596), (emphasis added)

Hence, as pointed out by the Fifth Circuit itself in its own recitation of the facts, the illegal tactics *immediately* precipitated the involuntarily obtained testimony of Ehrlich. Again, it must be stressed that there was no break in the link of causation between the illegal police tactics and the statements obtained via the use of those tactics.

As is manifestly clear in the passage quoted hereinabove, Ehrlich did not come forward voluntarily, but was *coerced* into giving her statements, and, did not testify voluntarily at the trial. Again, quoting from the Fifth Circuit's own recitation of the facts:

> Before Ehrlich actually testified at trial, however, she attempted through counsel specially appointed to represent her at trial, to assert her Fifth Amendment privilege against testifying. She argued that she had not testified voluntarily at the suppression hearing, nor was her appearance at trial a voluntary one. She admitted that she had not been granted any immunity, but she claimed that she had been promised that she would not have to testify against her boyfriend, Leon Perry. The District Judge ruled that her testimony at the suppression hearing had been given voluntarily and that in giving her testimony she had waived her Fifth Amendment privilege. He therefore ordered to testify or be held in contempt. (*Fredericks*, at 1597.)

Therefore, while one of the factors weighing heavily on the decision of this Court in *Ceccolini* was that Miss Hennessey came forward and testified against the Defendant on a voluntary basis, that is not the same posture in which Miss Ehrlich came forward. She was *forced* into testifying and in no way and at no time came forward as a voluntary witness on behalf of the government.

The third point in *Ceccolini*, upon which this Court based its judicious decision to allow Miss Hennessey's testimony into evidence was that the initial illegality was never conducted specifically with any intent of finding a willing and knowledgeable witness to testify against Ceccolini. This is simply not the same factual picture that was drawn in *Fredericks*. There, the initial illegality was conducted *specifically* with the intent of finding a willing and knowledgeable witness to testify against Perry, Calver, and your Petitioner, Fredericks. As the argument hereinabove amply points out, the narcotics agents enticed Ehrlich and Fredericks into Calver's apartment for the *sole* purpose of conducting an in depth interrogation of them; all of which was commandeered via illegal police conduct. It is evident, then, that the factors which prompted this Court to hold that Ceccolini did not have sufficient grounds upon which to silence Hennessey's testimony, are the same grounds upon which your Petitioner *does* have standing to suppress Ehrlich's testimony. The conflict, then, between the two decisions is evident, and the Fifth Circuit's opinion, contrary to the holding of this Court, requires at the very least a closer examination by this High Court so that this all important standing issue can at last be resolved.

2. Clearly, the question presented is of importance in the administration of the criminal justice laws. Indeed, the time has finally come for this Court to deal specifically with this most tenuous area of standing. As can be seen from the Fifth Circuit's opinion in *Fredericks*, the police used heavy-handed, psychologically coercive tactics in their illegal interrogation of Ehrlich. And, as conceded by the lower court, said tactics were used as a means of obtaining incriminating

testimony against Valerie Fredericks. And yet, when Valerie attempted to suppress Ehrlich's testimony on the basis of these illegalities, she was denied standing. In upholding the District Court's decision to deny standing, the Fifth Circuit opined:

> In this case, however, the actions of the DEA officers, even if viewed in the worst possible light, were a far cry from the sort of third-degree physical or psychological coercion that might prompt us to disregard all together the societal interest in law enforcement by excluding the highly probative testimony of a nondefendant. (*Fredericks,* at 1601).

What would so "prompt the court"? Torture? This area is crying out for some sort of standard, one to which both the government agents and the courts must be held accountable so that the rights of Codefendants, (Codefendants who are undeniably victimized by the police illegal conduct) may be afforded the Constitutional protections this Court has always sought to give.

Hence, settlement of the question by this Court is plainly in the public interest, since it is likely to be a question presented in a majority of criminal cases involving the testimony of Codefendants, and some sense of federal uniformity must be established.

3. The decision of the Court below is believed to be erroneous and the conflicting decision of the Court in *Ceccolini,* not only correct, but, because it is the decision of the highest court of this nation would of course supercede the Fifth Circuit holding.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ STUART A. MARKUS,
Counsel for Petitioner

February 8, 1979.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

VALERIE FREDERICKS,

Petitioner,

v.

UNITED STATES OF AMERICA

TO Solicitor General of the United States,
Counsel for Respondent:

YOU ARE HEREBY NOTIFIED that the petition for writ of certiorari in the above-entitled and numbered case was filed in the Supreme Court of the United States on the 9th day of February, 1979.

/s/ STUART A. MARKUS,
Counsel for Petitioner
2251 S.W. 22nd Street
Miami, Florida 33145
(305) 856-6910

STATE OF FLORIDA)
) ss.;
COUNTY OF DADE)

PERSONALLY APPEARED before me this day, STUART A. MARKUS, who, being duly sworn on oath deposes and says:

1. That he is Counsel for the Petitioner in the above and foregoing cause.

2. That three copies of the foregoing Petition for Writ of Certiorari have been served on the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

3. That he has read the allegations contained herein and the same are true and correct

SWORN TO and SUBSCRIBED TO before me this 8th day of February, 1979.

/s/ STUART A. MARKUS

NOTARY PUBLIC,
STATE OF FLORIDA

My Commission Expires:

_____

APPENDIX A

Copies of opinions and judgments below.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 77-405-Cr-CA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEON PERRY,
Defendant.

PROCEEDINGS ON MOTION TO SUPPRESS

Room 253,
United States Courthouse,
300 Northeast 1st Avenue,
Miami, Florida,
Thursday, October 6, 1977.

The above-entitled matter came on for Hearing, pursuant to notice, commencing at 1 p.m.

BEFORE:

THE HONORABLE PETER R. PALERMO,
United States Magistrate.

APPEARANCES:

PATRICK SULLIVAN, Esq.,
on behalf of the Government.

STUART A. MARKUS, Esq.,
on behalf of Valerie Fredericks.

GEORGE NICHOLAS, Esq.,
on behalf of the Defendant.

Perry — Direct

Q. Did she have a key to the apartment?

A. She has a key.

THE COURT: We don't have any controversy here.

Are there any further questions of this witness?

Any other questions from the Government

MR. NICHOLAS: Nothing, Your Honor.

(Thereupon, the witness was excused.)

THE COURT: Any other witnesses from the defendant?

MR. NICHOLAS: No, Your Honor.

THE COURT: This Court would find that the issue before it on the motion to suppress is (1) whether or not Robin lived with Mr. Perry and both had access and lived there.

The Court would find that as a fact.

The issue, of course, is whether the admission of the officers to go in there was voluntarily given, freely and voluntarily given by Robin.

Secondly, whether the officer had the right to search the suitcase.

This Court would find from the testimony and conclusive as a fact that the entry to the apartment was not proper, according to the discussion, nor was the search of the suitcase. It would find that the agents, under the conditions that existed at the time, had plenty of time to secure the apartment and to obtain a search warrant, if they had probable cause for same, both as to going into the apartment. And, even if the apartment was entered legally to gain possession of the suitcase, they could have gained possession and gotten a search warrant for the suitcase and the Court would so find that both the search of the apartment and the search of the suitcase was not proper and recommends suppression as to the Quaaludes.

As to standing, it would find that all parties have standing.

The testimony of Robin was that Miss Fredericks brought the suitcase into the apartment, which would give her standing.

Since it was Perry's apartment, it would give him standing.

As to Craig Calver, I didn't hear any testimony as to his standing whatsoever.

I would rule that the motion to suppress does not apply as to him.

The Government can proceed from there.

MR. MARKUS: What about Count I?

THE COURT: I am not dismissing it. I am just recommending a finding of fact.

The Court is ruling that as to Perry and Fredericks, the search of the apartment was illegal and also the suitcase.

MR. SULLIVAN: May I clarify one thing?

Does the Court find that Robin Ehrlich's consent to enter her apartment was or was not freely given?

THE COURT: It was not freely given.

I would believe that any reasonable person of her age and sex or whatever, when confronted with policemen under those circumstances, from her own testimony, she was questioned, taken in. There was the proffer she was even yelled at. I would think even I would agree to let them in my apartment under those conditions. Any reasonable person would. And I would not feel it was freely and voluntarily given and I will so recommend.

Gentlemen, I have stated the ground rules. The court reporter will file his transcript. You can appeal to Judge Atkins. I will deliver the file with a memorandum to him at least by tomorrow so he will be aware of the possibilities.

You have five days from the date of the filing of the transcript.

I will speak with Judge Atkins and let him know that I have so ruled.

MR. SULLIVAN: Is the evidence suppressed as to both counts or only as to Count II, the possessory count?

THE COURT: I don't think that is my prerogative. That is what Judge Atkins has to rule on. I am ruling that the seizure of the property as to those two people was illegal and not voluntarily given. And Judge Atkins can take it from there.

I am only ruling as to the individuals and the search. I am not ruling as to any other part of the counts or the indictment. I am not going to get into what was dismissed. Only Judge Atkins has the authority to do that.

(Thereupon, the hearing was concluded.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 77-405-Cr-CA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CRAIG CALVER, LEON PERRY, VALERIE FREDERICKS,
Defendants.

South Courtroom
United States Court House
Miami, Florida
Tuesday, October 18, 1977
1:00 o'clock P.M.

The above entitled cause came on for trial before The Honorable C. CLYDE ATKINS, and a jury duly empaneled.

APPEARANCES:

EDWARD GALANTE, Assistant United States Attorney,
On behalf of the Government.

MELVYN KESSLER, ESQ.,
On behalf of Defendant Calver.

GEORGE NICHOLAS, ESQ.,
On behalf of Defendant Perry.

STUART A. MARKUS, ESQ., and
KENNETH FELDMAN, ESQ.,
On behalf of Defendant Fredericks.

THE CLERK: As I call your name, will you answer so that you can be heard by all.

(Thereupon the jury was polled as to their verdict and all answered in the affirmative to the question: "Are the verdicts as read, your verdicts?")

THE COURT: Thank you, ladies and gentlemen, for your service as jurors in this case.

(Thereupon the jury was excused.)

THE COURT: Craig Calver, Leon Perry and Valerie Fredericks, a jury of your peers having returned verdicts of guilty as to each of you, with respect to the charges contained in the indictment, the Court now adjudges you guilty and refers this matter to the Probation Office for a presentence report. At that time I will hear from you and your counsel as to any matters that I should consider before imposing sentences.

These defendants are at liberty on bond. Is there any objection to their remaining on the same bonds?

MR. GALANTE: No, sir.

THE COURT: I will permit you to remain at liberty under the same bonds previously posted and under the same conditions.

I do remind you that if you fail to appear after having been notified to attend upon the Court for the purpose of sentencing that your failure to be here would be a separate offense as to that which you have been found guilty here today.

Good evening.

(Thereupon the trial was adjourned.)

UNITED STATES of America,
Plaintiff-Appellee,

vs.

Valerie FREDERICKS, Craig Calver,
and Leon Perry,
Defendants-Appellants.

No. 77-5802.

United States Court of Appeals,
Fifth Circuit.

Dec. 15, 1978.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, GODBOLD and FAY, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Valerie Fredericks, Craig Calver, and Leon Perry have been found guilty by a jury for conspiring to distribute methaqualone hydrochloride (quaalude capsules), in violation of 21 U.S.C.A. §846. The Government investigation which led to their convictions was hardly exemplary, but we find that none of the defendants' asserted points of error require reversal and we therefore affirm the judgments entered below.

I. The Evidence Before The Jury

The evidence introduced at trial consisted primarily of the testimony, of three witnesses: Armando Marin and Robert Fredericks, both Special Agents with the Drug Enforcement Administration (DEA), and Robin Ehrlich, who was an unindicted coconspirator of the three defendants.[1]

Special Agent Marin testified that on July 30, 1977, while acting in an undercover capacity, he was introduced to Craig Calver by a Carlos Lagos-Martinez at Calver's residence. In the presence of Marin and an informant, Calver asked Lagos-Martinez if he was still interested in obtaining some quaaludes, and Lagos-Martinez said that he was.

Two days later, according to Marin's testimony, while in Lagos-Martinez's hotel room, he answered a telephone call for Lagos-Martinez from "Leon." The gist of Leon's message was that he had the 2,000 quaaludes that Lagos-Martinez desired. Marin told Leon that he, Marin, was to be the actual purchaser of the quaaludes and that he wanted 10,000 tablets, not 2,000. Leon told Marin that obtaining 10,000 quaaludes would take a while longer and that he would call Marin back later. Shortly thereafter, Leon called again and told Marin that he would be able to supply 10,000 tablets, but that Marin would have to pick them up at "Craig's house." Marin testified that he subsequently ascertained that Leon was referring to the apartment of Craig Calver.

[1]Defendant Craig Calver also testified, but his testimony was limited to his educational background and his general good charter, and is not pertinent to this appeal. The other two defendants did not take the stand.

Less than an hour after Leon's second call, Marin called Craig Calver's apartment. Calver answered the phone and Marin asked to speak to Leon. Calver told him that Leon was "getting something together" and was not there at the moment. Marin asked if Leon was getting the quaaludes together and Calver answered: "Yes. You are going to have to come and pick them up."

Marin then testified that about 9:00 p.m. on the same day, August 1, he went to Calver's apartment along with an informant. Both Calver and Leon Perry were at the apartment, and Marin was introduced to Perry by Calver. As Marin shook Perry's hand, he observed to Perry that they had earlier spoken to one another on the phone and Perry acknowledged that fact. Perry then asked Marin if he had the money for the quaaludes. Marin assured Perry that he did, but said that he would not reveal any money until he could see the quaaludes. Perry told Marin that the quaaludes were at his girlfriend Robin's house, which was a few buildings away, and that Marin would have to wait at Calver's apartment for a few minutes. Calver and Perry then left the apartment.

When Calver and Perry returned about ten minutes later, Perry told Marin that they would have to postpone the transaction for a while because there were too many police officers in the area. Calver indicated his agreement that the deal would have to be postponed. Marin then revealed the fact that he was a federal officer and arrested Calver and Perry.

Special Agent Fredericks corroborated some of the testimony given by Agent Marin. Fredericks testified that on the night of August 1, 1977, he, along with other agents, was stationed outside Craig Calver's apartment.

In the course of his surveillance, he observed Agent Marin enter the apartment, defendants Calver and Perry leave the apartment, and finally Calver and Perry return to the apartment, after which he assisted Agent Marin in arresting the two male defendants.

The final Government witness was Robin Ehrlich, the unindicted coconspirator. She testified that she shared an apartment with Leon Perry and that on August 1, 1977, Perry told her that some people would be dropping by. Later that day, according to Ehrlich's testimony, the defendant Valerie Fredericks arrived by taxi with a suitcase. Ehrlich testified that while in the presence of herself, Perry, Fredericks, and another individual, the suitcase was opened revealing stacks of foil packages, which Fredericks referred to as quaaludes. Fredericks then stated that before she relinquished the quaaludes, she would have to receive some money, and she was assured that some men were coming with the money.

Ehrlich also testified that later during the same evening, after 9:00 p.m., she and Fredericks left Perry's apartment. When asked why they left the apartment, Ehrlich responded that she was concerned about Perry's whereabouts and Fredericks "wanted to find out what happened with the deal." According to Ehrlich's subsequent testimony, the two women went to Craig Calver's apartment, where they found Calver and Perry and a number of agents.

After the Government rested its case, Special Agent Marin was recalled to the stand by the defense. At that point it was brought out that he had arrested Valerie Fredericks at Calver's apartment approximately twenty minutes after she had arrived there.

* * *

This account of the testimony heard by the jury is not a complete account of the facts relevant to our disposition of this appeal. But we have separately presented the evidence before the jury in order to respond to the first contention made by each of the three appellants — that there was insufficient competent evidence to sustain the jury's verdict that they had conspired to distribute quaaludes. Each of the appellants also urges that their convictions must be reversed on three other grounds. We will supply the background for each of those contentions when we respond to them in the course of this opinion.

II. Sufficiency Of The Legally Competent Evidence

[1-3] At the close of the prosecution's case-in-chief, each of the defendants moved for acquittal on the ground that the prosecution had failed to introduce sufficient, legally competent evidence to prove that a conspiracy existed, that each defendant knew about it, and that each defendant voluntarily participated in the conspiracy.[2] The defendants' motion were denied. The test for sufficiency of proof on a motion for judgment of

[2]The essential elements of a criminal conspiracy are an agreement by two or more persons to commit an offense against the United States attended by an overt act by one of them in furtherance of the agreement. *E. g., United States v. Perez*, 5 Cir., 1973, 489 F.2d 51, 61, *cert. denied*, 1974, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664. While no formal agreement nor direct evidence is necessary to establish a conspiracy, *United States v. Barrera*, 5 Cir., 1977, 547 F.2d 1250, 1256, "[t]here must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and that the accused, with that knowledge, voluntarily became a part of it," *United States v. Gutierrez*, 5 Cir., 1977, 559 F.2d 1278, 1280.

acquittal, and on review of the denial of such a motion, is whether the jury might reasonably conclude that the evidence, viewed in the light most favorable to the prosection, is inconsistent with every reasonable hypothesis of the accused's innocence. *E. g., United States v. Barrera,* 5 Cir., 1977, 657 F.2d 1250, 1255; *United States v. Warner,* 5 Cir., 1971, 441 F.2d 821, 825, *cert. denied,* 1971, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58.

[4] Assuming for the moment that all the evidence recounted above was properly admitted, there is no question that it was sufficient for the jury to exclude any reasonable hypothesis but that of the defendants' guilt. The jury could infer the existence of an illegal conspiracy and the defendants' knowing and willing participation in it from the initial meeting of Calver and Special Agent Marin at Calver's apartment, from the phone conversations Marin had with Perry and Calver negotiating and making arrangements for the sale of 10,000 quaaludes, from the conversations that occurred at Calver's apartment when Marin went there to complete the sale, from the postponement of the deal by Perry and Calver because too many police were in the vicinity, from Fredericks' arrival at Perry's apartment with a suitcase of quaaludes and the conversation between Fredericks and Perry about money, and from Fredericks' trip to Calver's apartment to find out what was happening with the deal.[3] And the jury was warranted in deducing from this evidence inferences that excluded beyond a reasonable doubt any possibility of innocence.

[3]The overt act requirement need be satisfied by only one of the coconspirators. *See* note 2, *supra.* In this case, the jury could have found that all three defendants committed the necessary overt act—for example, that Perry telephoned Marin to make arrangements for the transaction and contacted Fredericks to supply the quaaludes; that Calver, along with Perry, left Calver's apartment to pick up the quaaludes; and that Fredericks actually supplied the quaaludes.

The crucial question then is whether all this evidence was properly admitted for the jury's consideration. In their briefs, the appellants challenged the admission of Robin Ehrlich's testimony in its entirety on the ground that it was obtained and introduced in violation of both their constitutional rights and hers. In Part VI of this opinion, however, we reject this argument and hold that notwithstanding any violation of Robin Ehrlich's rights, appellants were not entitled to the suppression of her testimony.

[5, 6] In oral argument, appellants raised an additional objection to the competence of the evidence. Each appellant claimed that the prosecution failed to establish the necessary foundation for the admission of various coconspirator statements against all of the defendants and not just the declarant. F.R.Evid. 801(d)(2)(E) provides that statements made by a coconspirator during the course and in furtherance of the conspiracy are not hearsay and may be admitted against other coconspirators.[4] Nevertheless, such statements cannot serve as the sole proof that the defendant against whom they are admitted indeed was a member

[4]"Hearsay" is defined in Rule 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(d)(2)(E) in essence codifies the long-recognized coconspirator exception to the hearsay rule by providing that "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

of the conspiracy. The Government must produce independent evidence both that the conspiracy existed and, with respect to any defendant coconspirator against whom the statements are admitted, that he or she was a member of that conspiracy.[5] The Government may use, however, *any* otherwise admissible evidence in meeting this threshold burden of production, *including* — with respect to any particular defendant — any out-of-court statements made by that defendant in the presence of a witness testifying under oath.[6]

[7-9] Contrary to the appellants' assertion, the prosecution satisfied the conditions for application of Rule 801(d)(2)(E). Calver's conversations with Marin as well as his conduct at his apartment on the night of August 1 constituted sufficient independent evidence of his participation in the conspiracy for the out-of-court statements of the other co-conspirators to be admitted against him. Similarly, Perry's conversations with Marin and in the presence of Ehrlich, as well as his activities both at his apartment and at Calver's, permitted the admission of his fellow conspirator's statements against him. Finally, the statements of Calver and Perry could be used against Fredericks by virtue of her statements and actions in the presence of, and as attested to by, Robin Ehrlich.

III. A Prosecutorial Lapse

[10, 11] The second ground upon which appellants seek to have their convictions overturned involves an improper remark by the prosecutor during his closing argument. The impulse for the prosecutor's indiscretion was provided by the attorney for Craig Calver, who, dur-

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[5] The declarations of one conspirator made in furtherance of the objects of the conspiracy, and during its existence, are admissible against all members of the conspiracy. * * * But a defendant's connection with a conspiracy cannot be established by extrajudicial declarations of a co-conspirator, made out of the presence of the defendant. There must be proof *aliunde* of the existence of the conspiracy, and of the defendant's connection with it, before such statements become admissible as against a defendant not present when they were made. * * *

United States v. Apollo, 5 Cir., 1973, 476 F.2d 156, 159, *quoting Montford v. United States*, 5 Cir., 1952, 200 F.2d 759, 760; *see also United States v. Hansen*, 5 Cir., 1978, 569 F.2d 406, 409.

Apollo also announced certain procedures for determining whether these conditions of proof *aliunde* are satisfied. The *Apollo* procedural framework was recently overhauled in the court's opinion in *United States v. James*, 5 Cir., 1978, 576 F.2d 1121, *now pending on rehearing en banc*, but neither this aspect of *Apollo* nor the *James* revision is material to any of the issues raised by appellants in this case.

[6] *Cf. United States v. Crockett*, 5 Cir., 1976, 534 F.2d 589, 599; 4 Weinstein's Evidence ¶ 801(d)(2)(E)[01], at 801-148 n. 28 (J. Weinstein & M. Berger, 1976). Extrajudicial statements made by a defendant will usually be admissible against him to show his knowing participation in a conspiracy under one or more Federal Rules — *e. g.*, F.R.Evid. 801(d(2)(A) (personal admission); F.R.Evid. 803(3) (statement of then existing state of mind); F.R.Evid. 803(6) (records of regularly conducted activity); F.R.Evid. 804(b)(3) (statement against interest).

ing his summation to the jury, legitimately attempted to undermine the Government's case by asking, rhetorically, why the Government had not called several possible material witnesses, among them Carlos Lagos-Martinez, the man whom Agent Marin testified had introduced him to Craig Calver.[7] The prosecuting attorney took the bait and, when his turn came, responded, "Mr. Lagos-Martinez is in jail" — a fact that had never been introduced into evidence. All three defense counsel immediately objected and moved for a mistrial. The Judge denied the motion, but carefully instructed the jury to disregard the prosecutor's remark.

Appellants contend that this reference to a fact not in evidence was so improper and highly prejudicial that they were deprived of a fair trial, notwithstanding the curative instructions given by the Trial Judge. We disagree.

We acknowledge that the comment in question was improper, and we recognize that improper statements

[7]The relevant portions of the argument by Calver's attorney are as follows:

> Where is this Mr. Carlos Lagos-Martinez? Where is he? Where is this informant that the Government said was there? Why wasn't he put on the stand to corroborate the agent's testimony?
>
> I am not saying that the agent is lying, obviously not. That is not the issue. The issue is that it is uncorroborated.
>
> * * * * * *
>
> Why wasn't Carlos Lagos-Martinez brought in? He was not indicted in this case.

by prosecutors in summation is a recurring problem in this Court. But several factors militate against finding reversible error in this cause. The infelicitous remark was not uttered out of the blue. Rather, it was made in response to the closing argument of Calver's attorney. This fact alone does not, of course, exonerate the prosecutor, but it does tend to absolve him of any prejudicial intent that might otherwise warrant our reprobation in the form of a reversal under our supervisory powers regardless of whether any prejudice in fact occurred.

Furthermore, not only does the record indicate that the remark was devoid of prejudicial intent, but we also are unable to conclude that it had any prejudicial effect. Prejudice would have occurred only if the jurors made the broad inferential leap from the mere statement that a relatively minor figure in the events recounted at trial was in jail to the conclusion that he was in jail because of his participation in those same events and that therefore the defendants must also be guilty. We seriously doubt whether the jurors would have drawn such an inference even in the absence of any curative instructions. And since ample instructions to disregard were in fact given, we are satisfied beyond any doubt that the defendants were not unfairly prejudiced by the remark. *See generally United States v. Morris*, 5 Cir., 1978, 568 F.2d 396, 401-02.

IV. Behind The Scenes: A Bungled Investigation

The remaining two errors that the appellants join in asserting relate specifically to witness Robin Ehrlich

and the testimony she gave. Consideration of these two purported errors requires us to examine in some detail aspects of this case that were not included in our account of the evidence before the jury.[8]

On August 1, 1977, shortly after Calver and Perry had been interrogated by numerous agents inside Calver's apartment, Valerie Fredericks and Robin Ehrlich appeared at the door of Calver's apartment and were invited inside by one of the agents. Because the behavior of the women indicated that they were familiar with Calver and Perry, the agents began to question them as well. Robin Ehrlich was led into a separate room and, according to her uncontroverted testimony, subjected to threatening and heavy-handed interrogation concerning the whereabouts of the quaaludes and whether she used drugs. As several Government agents later testified, she was extremely upset that her boyfriend Leon Perry had been arrested and, presumably, that she too was being detained. One of the agents advised her that the best thing she could do under the circumstances was to cooperate with the Government. Ehrlich then admitted that the quaaludes were in the apartment that she shared with Perry and that they had been brought there in a suitcase by Valerie Fredericks. Subsequent testimony given by the various Government agents was inconclusive concerning whether Ehrlich had been given any *Miranda* warnings prior to this interrogation, even though she was, according to one officer's testimony, under arrest and it was manifestly clear to all, including Ehrlich herself, that she was not free to leave.

[8]This second and concluding chapter in our tale of the quaalude quagmire has been drawn from the transcript of a suppression hearing before a United States Magistrate and the transcript of several hearings held outside the presence of the jury during the trial itself.

The agents asked Ehrlich to lead them to Perry's apartment, telling her that if she refused to do so she would go to jail. She complied with this veiled threat. The door to Perry's apartment was locked, however, and Ehrlich did not have her key. Pressed by the agents, Ehrlich told them that Perry would have a key to the apartment. One of the agents warned her: "You had better not be lying to us, because if we have to get a search warrant, and we have to go through the trouble of that, it is going to be hard on you. You are going to go to jail for sure." Two of the agents returned to Calver's apartment, and, without his consent and while he was handcuffed, removed his keyes from his pantspocket. The agents returned with the key to Perry's apartment (where Ehrlich had remained in the custody of another agent), gave the key to Ehrlich, and ordered her to open the door. She obeyed and they entered the apartment. Inside, the agents found a man whom they arrested and subsequently released as well as the suitcase which Ehrlich had stated had been brough to the apartment by Fredericks. The agents opened the suitcase, revealing the quaaludes wrapped in aluminum foil.

The agents handcuffed Ehrlich and took her to a DEA office for processing. At the DEA office, an agent read the *Miranda* warnings to Ehrlich, she waived her rights, and she gave a complete account of her knowledge of the quaalude activities of Calver, Perry, and Fredericks. Ehrlich later testified that this was the first time she was advised of her *Miranda* rights, and the Government never was able to establish otherwise. In-

dicative of the confused and haphazard treatment accorded Ehrlich is the fact that no two Government agents ever agreed about the precise time at which she was arrested.

Calver, Perry, and Fredericks subsequently were indicated both for conspiracy to distribute quaaludes and for possession of quaaludes with intent to distribute, while Robin Ehrlich assumed the status of an unindicted coconspirator. Prior to trial, the three defendants moved to suppress the quaaludes. Ehrlich was subpoenaed to testify at the suppression hearing and was told that if she failed to testify she would be arrested. Before testifying, she asked an Assistant United States Attorney if she could bring an attorney with her and was told that while she could, he did not think she would need an attorney. Without ever having consulted a lawyer of her own, she gave testimony at the suppression hearing incriminating all three defendants.

After hearing her testimony and that of two police officers, the Magistrate ruled that the warrantless entry of Perry's apartment had been effected without the consent of either Perry or Ehrlich and was therefore improper. He also ruled that the warrantless search of Fredericks' suitcase was improper. In accordance with these rulings, he recommended suppression of the quaaludes as evidence against Perry and Fredericks.

The District Judge adopted the findings of the Magistrate and granted the motion to suppress the quaaludes as to Perry and Fredericks. As a result, the Government, during the trial, agreed to drop the substantive count against all three defendants, including Calver.

Each of the defendants then proceeded to challenge the testimony of Robin Ehrlich, who figured to be a crucial, if reluctant, witness for the prosecution. This motion to suppress her testimony was based on the ground that the Government had initially obtained her testimony without giving her *Miranda* warnings and as a result of an illegal search and arrest. The District Judge denied the motion, ruling that "[a]ny alleged illegal arrest or interrogation of Robin Ehrlich * * * cannot inure to the benefit of the defendants."

Before Ehrlich actually testified at trial, however, she attempted, through counsel specially appointed to represent her at trial, to assert a Fifth Amendment privilege against testifying. She argued that she had not testified voluntarily at the suppression hearing, nor was her appearance at trial a voluntary one. She admitted that she had not been granted any immunity, but she claimed that she had been promised that she would not have to testify against her boyfriend, Leon Perry. The District Judge ruled that her testimony at the suppression hearing had been given voluntarily and that in giving that testimony she had waived her Fifth Amendment privilege. He therefore ordered her to testify or be held in contempt.

Shortly after the Government began its direct examination of Ehrlich, she realized her testimony was being admitted against Leon Perry. She protested, citing her agreement with the Government that no evidence would be elicted from her concerning Leon Perry. The Government acknowledged the agreement, and all three defendants moved for a mistrial. The District Judge denied the motion, observing that any agreement between the Government and Ehrlich was not binding

upon the Court and that as far as he was concerned the defendants would have the usual latitude to cross-examine within the ambit of the direct and would be free to develop anything in the nature of impeachment. When direct examination of Ehrlich resumed, she gave the testimony reported above.

V. Right Of Confrontation

[12] Of the two objections appellants raise to Robin Ehrlich's testimony, one borders on the frivolous. Despite the fact that the Trial Judge expressly refused to give any deference to the agreement between the Government and Robin Ehrlich concerning the scope of her testimony, appellants argue that they were denied their Sixth Amendment right of confrontation by virtue of that agreement.[9] The record reveals, however, that the appellants had a full, fair, and meaningful opportunity to cross-examine Ehrlich both as to matters she testified to on direct and as to her agreement with the Government and its underlying motivation — her desire to avoid prosecution herself and to minimize the consequences of prosecution for her boyfriend, Leon Perry. *Cf. United States v. Onori*, 5 Cir., 1976, 535 F.2d 938, 945. Thus, far from bearing infringed, appellants' right of confrontation was fully honored and protected.[10]

[9]Oddly enough, Leon Perry joins in this argument.

[10]Indeed, Robin Ehrlich answered whatever questions concerning Leon Perry or her cooperation with the Government the defense attorneys asked her.

VI. Suppression, Tainted Fruit, And Standing

[13-17] Appellants' other objection to the testimony of Robin Ehrlich is somewhat more substantial, though ultimately no more meritorious. Appellants argue that Ehrlich's testimony should have been excluded in its entirety on four grounds: (1) it was obtained antecedent to, and as a consequence of, an illegal search; (2) it was obtained pursuant to an illegal arrest; (3) it was elicited from Ehrlich in derogation of the *Miranda* precepts;[11] and (4) it was compelled at trial in violation of Ehrlich's Fifth Amendment privilege against self-incrimination.

The only one of these asserted violations that appellants may properly urge in their own defense as grounds for the suppression of Ehrlich's testimony is the first — that her testimony was the result of an illegal search in violation of Perry's and Fredericks' Fourth Amendment rights. Despite the Government's contentions, there is no question but that the warrantless search of Perry's apartment and Fredericks' suitcase was unconstitutional,[12] and that the subsequently seized quaaludes could not be used as evidence against

[11]*See Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

[12]The Government fell far short in meeting its burden of proving that either Perry or Ehrlich had freely and voluntarily given their consent to the search of Perry's apartment, *see Schneckloth v. Bustamonte*, 1973, 412 U.S. 218, 233, 93 S.Ct. 2041, 36 L.Ed.2d 854; *Bumper v. North Carolina*, 1968, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797, and it has never even claimed that the DEA agents opened Fredericks' suitcase with her consent.

Perry or Fredericks. Nor is there any question but that the exclusionary rule applies not only to evidence actually seized in an illegal search, but also to evidence located as a result of information obtained in an illegal search, *i.e.*, to evidence that is, according to the somewhat tiresome legal argot, the "fruit of the poisonous tree." *E.g., Wong Sun v. United States*, 1963, 371 U.S. 471, 484-88, 83 S.Ct. 407, 9 L.Ed.2d 441; *Silverthorne Lumber Co. v. United States*, 1920, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.[13] Further, it is clear that verbal evidence as well as physical evidence may be the tainted fruit of an unlawful search and therefore suppressed. *E.g., United States v. Ceccolini*, 1978, 435 U.S. 268, 275, 98 S.Ct. 1054, 55 L.Ed.2d 268; *Wong Sun, supra*, 371 U.S. at 485-86, 83 S.Ct. 407.

[18] But to grant appellants these points does not compel the conclusion that Robin Ehrlich's testimony should have been suppressed. The fatal flaw in the appellants' argument is that the "fruit of the poisonous tree doctrine" is simply inapplicable in this context. Assuming that Ehrlich's testimony was in fact the "fruit" of governmental conduct, it was the fruit of actions *other* than the illegal entry into Perry's apart-

[13]There are, however, two important exceptions to the "fruit of the poisonous tree" branch of the exclusionary rule. Even if the Government acquires evidence indirectly through an illegal search, illegal arrest, or illegal interrogation of a defendant, that evidence need not be excluded (1) if the substance of the tainted evidence is subsequently discovered or acquired through an independent source, or (2) if the causal connection between the indirectly acquired evidence and the Government's unlawful conduct has "become so attenuated as to dissipate the taint." *See generally Wong Sun, supra*, 371 U.S. at 487-88, 83 S.Ct. 407; *Parker v. Estelle*, 1974, 5 Cir., 498 F.2d 625, 629, *cert. denied*, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450.

ment. The DEA officers, for example, had ascertained Ehrlich's identity, her relationship with Leon Perry, and the crucial element of her testimony — that a suitcase containing quaaludes had been brought to Perry's apartment by Valerie Fredericks — *before* their unconstitutional search of Perry's apartment. To the extent that the illegal search was the source of evidence against the appellants (namely, the suitcase and the quaaludes), the exclusionary rule was properly and fully applied. For the rule to be extended to encompass and exclude Ehrlich's testimony as well, appellants must show that it was by some other violation of their constitutional rights that the Government secured and introduced that testimony.

The evidence in the record is inconclusive, but it does suggest that there were indeed other constitutional violations in this case connected with the testimony Robin Ehrlich ultimately gave at trial. While there most likely was probable cause to support the arrest of Ehrlich, the evidence indicates that she was subjected to at least one custodial interrogation without having been advised of her *Miranda* rights. Moreover, Ehrlich's assertion of her Fifth Amendment privilege against self-incrimination may very well have been erroneously overruled by the Trial Judge. But whether or not Ehrlich's rights were infringed by her arrest, her interrogation, or the compulsion of her testimony is immaterial to this appeal. For the simple fact of the matter is that *appellant's* rights were not violated by any of those governmental acts and therefore suppression of Ehrlich's testimony is not required to protect or vindicate their rights.

[19] The Supreme Court expounded upon this principle that defendants do not have "standing" to assert on their own defense the denial of certain constitutional rights to others in *Alderman v. United States*, 1969, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176, a case which involved a claim that all incriminating evidence obtained through an illegal wiretap should be suppressed against all defendants, even those who were not parties to the bugged conversations:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.
>
> * * * * * *
>
> We adhere * * * to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights may not be vicariously asserted. * * * None of the special circumstances which prompted *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), and *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), are present here. There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party. The victim can and

> very probably will object for himself when and if it becomes important for him to do so.

394 U.S. at 171-74, 89 S.Ct. at 965-67.

[20] Although *Alderman* and most other "standing" cases have involved Fourth Amendment violations, the principle has also been applied where, as in this case, one codefendant or coconspirator seeks to suppress evidence incriminating him that was obtained from a coparticipant in crime without proper compliance with the procedural requirements of *Miranda* or otherwise in violation of that party's Fifth or Sixth Amendment rights. *E. g., Gissendanner v. Wainwright*, 5 Cir., 1973, 482 F.2d 1293, 1296 - 97; *United States v. Pruitt*, 9 Cir., 1972, 464 F.2d 494, 495; *United States v. Schennault*, 7 Cir., 1970, 429 F.2d 852, 855; *United States v. Bruton*, 8 Cir., 1969, 416 F.2d 310, 312-13, *cert. denied*, 1970, 397 U.S. 1014, 90 S.Ct. 1248, 25 L.Ed.2d 428. Similarly, at trial, a defendant can neither assert the Fifth Amendment right against self-incrimination on behalf of a witness, nor, if the witness himself asserts his privilege, take advantage of an error of the court in overruling it. *See, e. g., United States v. Colyer*, 5 Cir., 1978, 571 F.2d 941, 945; *Hall v. United States*, 5 Cir., 1969, 413 F.2d 45, 48; *United States v. Skolek*, 10 Cir., 1973, 474 F.2d 582, 584-85; *Bowman v. United States*, 9 Cir., 1965, 350 F.2d 913, 915-16, *cert. denied*, 1966, 383 U.S. 950, 86 S.Ct. 1209, 16 L.Ed.2d 212.

[21] By holding that appellants are not entitled to suppression of Ehrlich's testimony because of probable governmental violations of her rights, we do not sanction gross police misconduct against third parties in the overly zealous pursuit of criminal convictions. To use an

extreme example, the prosecution certainly would not be allowed to admit statements wrung from one of four criminal suspects through torture and unremitting prolonged interrogation in the trial of the other three suspects.[14] In this case, however, the actions of the DEA officers, even if viewed in the worst possible light, were a far cry from the sort of third-degree physical or psychological coercion that might prompt us to disregard altogether the societal interest in law enforcement by excluding the highly probative testimony of a nondefendant.[15]. Nor is there the slightest indication in the record that the reliability of Ehrlich's testimony, however involuntarily given, was at all suspect. Indeed, her story was consistent and persuasive throughout —

[14]*Cf. Bradford v. Johnson,* E.D.Mich., 1972, 354 F.Supp. 1331, *aff'd,* 6 Cir., 1973, 476 F.2d 66; *see also LaFrance v. Bohlinger,* 1 Cir., 1974, 499 F.2d 29, *cert denied,* 1974, 419 U.S. 1080, 95 S.Ct. 669, 42 L.Ed.2d 674; *United States v. Payner,* N.D.Ohio, 1977, 434 F.Supp. 113. The objection to the introduction of statements extracted from a nondefendant by extreme coercion and inquisitional tactics is twofold. First, there is the distinct possibility that the jurors will be captivated by the high degree of relevance such statements often possess and will fail to take into account the increased likelihood that the statements are unreliable. Second, the use of statements derived through shocking and intentional police misconduct offends the fundamental fairness essential to due process of law.

[15]*Cf. United States v. Janis,* 1976, 428 U.S. 433, 448-49, 96 S.Ct. 3021, 49 L.Ed.2d 1046; *Michigan v. Tucker,* 1974, 417 U.S. 433, 450-51, 94 S.Ct. 2357, 41 L.Ed.2d 182; *Nardone v. United States,* 1939, 308 U.S. 338, 340, 60 S. Ct. 266, 267, 84 L.Ed. 307 ("any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land.")

from the time of the arrests, through the suppression hearing, up to and including trial.

Appellants' right to a fair trial was not prejudiced by the introduction of this reliable and relevant testimony. Nor were any other of their rights violated by the manner in which the Government obtained that testimony. They have nothing about which to complain except their own indiscretion in dealing in quaaludes.

AFFIRMED.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 77-5802

D.C. Docket No. 77-405-CR-CA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VALERIE FREDERICKS, CRAIG CALVER
and LEON PERRY,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

Before BROWN, Chief Judge, GODBOLD and Fay, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

December 15, 1978

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5802

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VALERIE FREDERICKS, CRAIG CALVER
AND LEON PERRY,
Defendants-Appellants

Appeals from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

(January 11, 1979)

Before BROWN, Chief Judge, GODBOLD and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Valerie Fredericks in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

BROWN, Chief Judge

APPENDIX B

Conflicting opinion.

UNITED STATES,

Petitioner

v.

Ralph CECCOLINI.

No. 76-1151.

Argued Dec. 5, 1978.

Decided March 21, 1978.

Richard A. Allen, for petitioner.

Leon J. Greenspan, White Plains, N.Y., for respondent.

Mr. Justice REHNQUIST delivered the opinion of the Court.

In December 1974, Ronald Biro, a uniformed police officer on assignment to patrol school crossings, entered respondent's place of business, the Sleepy Hollow Flower shop, in North Tarrytown, N.Y. He went behind the customer counter and, in the words of Ichabod Crane, one of Tarrytown's more illustrious inhabitants of days gone past, "tarried," spending his short break engaged in conversation with his friend Lois Hennessey, an employee of the shop. During the course of the conversation he noticed an envelope with money sticking out of it lying on the drawer of the cash register behind the counter. Biro picked up the envelope and, upon ex-

amining its contents, discovered that it contained not only money but policy slips. He placed the envelope back on the register and, without telling Hennessey of what he had seen, asked her to whom the envelope belonged. She replied that the envelope belong to respondent Ceccolini, and that he had instructed her to give it to someone.

The next day, Officer Biro mentioned his discovery to North Tarrytown detectives who in turn told Lance Emory, an FBI agent. This very ordinary incident in the lives of Biro and Hennessey requires us, four years later, to decide whether Hennessey's testimony against respondent Ceccolini should have been suppressed in his trial for perjury. Respondent was charged with that offense because he denied that he knew anything of, or was in any way involved with, gambling operations. Respondent was found guilty after a bench trial in the United States District Court for the Southern District of New York, but immediately after the finding of guilt the District Court granted respondent's motion to "suppress" the testimony of Hennessey because the court concluded that the testimony was a "fruit of the poisoned tree"; assuming respondent's motion for a directed verdict included a motion to set aside the verdict of guilty, the District Court granted the motion because it concluded that without Hennessey's testimony there was insufficient evidence of respondent's guilt. The Government appealed these rulings to the Court of Appeals for the Second Circuit.

That court rightly concluded that the Government was entitled to appeal both the order granting the motion to suppress and the order setting aside the verdict of guilty, since further proceedings if the Government were

successful on the appeal would not be barred by the Double Jeopardy Clause.[1] 542 F.2d 136, 139-140 (2d. Cir. 1976). The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt. *United States v. Morrison,* 429 U.S. 1, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976); *United States v. Wilson,* 420 U.S. 332, 352-353, 95 S.Ct. 1013, 1026, 43 L.Ed.2d 232 (1975).

The Government, however, was not successful on the merits of its appeal; the Court of Appeals by a divided vote affirmed the District Court's suppression ruling. 542 F.2d, at 140-142. We granted certiorari to consider the correctness of this ruling of the Court of Appeals.

I

During the latter part of 1973, the Federal Bureau of Investigation was exploring suspected gambling operations in North Tarrytown. Among the establishments under surveillance was respondent's place of business, which was a frequent and regular stop of one Francis Millow, himself a suspect in the investigation.

[1]Appeal of the suppression motion is, of course, authorized by the clear language of 18 U.S.C. § 3731 . . . That section permits "[a]n appeal by the United States . . . from a decision or order of a district courts [sic] suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on the indictment or information . . ." If Congress had intended only pretrial suppression motions to be appealable, it would not have added the phrase "and before the verdict of finding on the indictment or information."

While the investigation continued on a reduced scale after December 1973,[2] surveillance of the flower shop was curtailed at that time. It was thus a full year after this discontinuance of FBI surveillance that Biro spent his patrol break behind the counter with Hennessey. When Biro's discovery of the policy slips was reported the following day to Emory, Emory was not fully informed of the manner in which Biro had obtained the information. Four months later, Emory interviewed Hennessey at her home for about half an hour in the presence of her mother and two sisters. He identified himself, indicated that he had learned through the local police department that she worked for respondent, and told her that the Government would appreciate any information regarding respondent's activities that she had acquired in the shop. Emory did not specifically refer to the incident involving Officer Biro. Hennessey told Emory that she was studying police science in college and would be willing to help. She then related the events which had occurred during her visti with Officer Biro.

In May of 1975, respondent was summoned before a federal grand jury and testified that he had never taken policy bets for Francis Millow at the flower shop. The next week Hennessey testified to the contrary, and

[2]The extent of the continued investigation is not made clear on the record but we do know at least that on December 3, 1974, a telephone conversation between Millow and Ceccolini, which implicated the latter in a policy betting operation, was intercepted by local police participating in a combined federal-state gambling investigation.

shortly thereafter respondent was indicted for perjury.[3] Respondent waived a jury, and with the consent of all parties the District Court considered simultaneously with the trial on the merits respondent's motion to suppress both the policy slips and the testimony of Hennessey. At the conclusion of the evidence, the District Court excluded from its consideration "the envelope and the contents of the envelope," but nonetheless found respondent guilty of the offense charge. The court then, as previously described, granted respondent's motion to suppress the testimony of Hennessey, because she "first came directly to the attention of the government as the result of an illegal search" and the Government has not "sustained its burden of showing that Lois Hennessy's [*sic*] testimony definitely would not have been obtained without the illegal search." Pet. for Cert., pp. 28a-29a.

The Court of Appeals affirmed this ruling on the Government's appeal, reasoning that "the road to Miss Hennessy's [*sic*] testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted." 542 F.2d, at 142. The Court of Appeals also concluded that there was support in the record for the District Court's finding that the ongoing investigation would not have inevitably let to the evidence in question even without Biro's discovery of the two policy slips. *Id.*, at 141. Because of our traditional deference to

[3]Respondent was also indicated on a second count which charged that he had knowingly made a false statement when he testified that he did not known Hank Bucci was involved in gambling operations. The judge found respondent not guilty on this count, however, because "although there is evidence to support this charge the government has not met its burden of proof beyond a reasonable doubt." Pet. for Cert., p.28a.

the "two court rule," *Graver Mfg. Co. v. Linde Co,* 336 U.S. 271, 275, 69 S.Ct. 535, 537, 93 L.Ed. 672 (1949), and the fact that the Government has not sought review of this latter ruling, we leave undisturbed this part of the Court of Appeals decision. Because we decide that the Court of Appeals was wrong in concluding that there was insufficient attenuation between Officer Biro's search and Hennessey's testimony at the trial, we also do not reach the Government's contention that the exclusionary rule should not be applied when the evidence derived from the search is being used to prove a subsequent crime such as perjury

II

The "road" to which the Court of Appeals analogized the train of events from Biro's discovery of the policy slips to Hennessey's testimony at respondent's trial for perjury is one of literally thousands of such roads traveled periodically between an original investigative discovery and the ultimate trial of the accused. The constitutional question under the Fourth Amendment was phrased in *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), as whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become 'so attenuated as to dissipate the taint.'" *Id.*, at 487, 491, 83 S.Ct. at 417. The question was in turn derived from the Court's earlier decision in *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939), where Mr. Justice Frankfurter stated for the Court:

> "Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and

> inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319.
>
> "In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

This, of course, makes it perfectly clear, if indeed ever there was any doubt about the matter, that the question of causal connection in this setting, as in so many other questions with which the law concerns itself, is not to be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well. And our cases subsequent to *Nardone, supra,* have laid out the fundamental tenets of the exclusionary rule, from which the elements that are relevant to the causal inquiry can be divined.

[1, 2] An examination of these cases leads us to reject the Government's suggestion that we adopt what would in practice amount to a *per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection

between it and a violation of the Fourth Amendment. We also reaffirm the holding of *Wong Sun, supra,* 371 U.S. at 485, 83 S.Ct. at 416, that "verbal evidence which derives so immediately from unlawful entry and an unauthorized arrest as the officer's action in the present case is no less the 'fruit' of official illegality than the more commonplace tangible fruits of the unwarranted intrusion." We are of the view, however, that cases decided since *Wong Sun* significantly qualify its further observation that "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence." *Id.*, at 486, 83 S.Ct. at 416. Rather, at least in a case such as this, where not only was the alleged "fruit of the poisonous tree" the testimony of a live witness, but unlike *Wong Sun* the witness was not a putative defendant, an examination of our cases persuades us that the Court of Appeals was simply wrong in concluding that if the road were uninterrupted, its length was immaterial. Its length, we hold, *is* material, as are certain other factors enumerated below to which the court gave insufficient weight.

In *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct 3037, 3047, 49 L.Ed.2d 1067 (1976), we observed that "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings against all persons." 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067. Recognizing not only the benefits but the costs, which are often substantial, of the exclusionary rule, we have said that "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38

L.Ed.2d 561 (1974). In that case, we refused to require that illegally seized evidence be excluded from presentation to a grand jury. We have likewise declined to prohibit the use of such evidence for the purpose of impeaching a defendant who testifies in his own behalf. *Walder v. United States*, 347 U.S. 62, 74 S.Ct 354, 98 L.Ed. 503 (1954).

We have limited the standing requirement in the exclusionary rule context because the "additional benefits of extending the . . . rule" to persons other than the ones subject to the illegal search are outweighed by the, "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman v. United States*, 394 U.S. 165, 174 - 175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176 (1969). Even in situations where the exclusionary rule is plainly applicable, we have declined to adopt a *"per se* or 'but for' rule" that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest. *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975).

Evaluating the standards for application of the exclusionary rule to live-witness testimony in light of this balance, we are first impelled to conclude that the degree of free will exercised by the witness is not irrelevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application. This is certainly true when the challenged statements are made by a putative defendant after arrest, *Wong Sun, supra*, 371 U.S. at 491, 83 S.Ct. at

419; *Brown v. Illinois, supra,* and a *fortiori* is true of testimony given by nondefendants.

The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness.[4] Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness's willingness to testify.

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of the potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence." *Smith v. United States,* 117 U.S.App.D.C. 1, 4, 324 F.2d 879, 881 (D.C.Cir. 1963), cert. denied, 377 U.S. 954, 84 S.Ct. 1632, 12 L.Ed.2d 498 (1964); Per Burger, J.

[4]Of course, the analysis might be different where the search was conducted by the police for the specific purpose of discovering potential witnesses.

Another factory which is not only relevant in determining the usefulness of the exclusionary rule in a particular context, but also seems to us to differentiate the testimony of all live witnesses — even putative defendants — from the exclusion of the typical documentary evidence, is that such exclusion would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby. Rules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor McCormick, "serious obstructions to the ascertainment of truth"; accordingly, "[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions." McCormick on Evidence §71, p. 150 (1954). Alluding to the enormous cost engendered by such a permanent disability in an analogous context, we have specifically refused to hold that "making a confession under circumstances which preclude its use perpetually disables the confessor from making a usable one after those conditions have been removed." *United States v. Bayer,* 331 U.S. 532, 540, 67 S.Ct. 1394, 1398, 91 L.Ed 1654 (1947). For many of these same reasons, the Court has also held admissible at trial testimony of a witness whose identity was disclosed by the defendant's

statement given after inadequate *Miranda* warnings. *Michigan v. Tucker*, 417 U.S. 433, 450-451, 94 S.Ct. 2357, 2367, 41 L.Ed.2d 182 (1974).

> "For, when balancing the interests involved, we must weight the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. . . Here respondent's own statement, which might have helped the prosecutor show respondent's guilty conscience at trial, had already been excused from the prosecutor's case pursuant to this Court's *Johnson v. New Jersey*, 384 U.S. 719, 96 S.Ct. 1772, 16 L.Ed.2d 882 (1966) decision. To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent." *Ibid.*

In short, since the cost of excluding live-witness testimony often will be greater, a closer more direct link between the illegality and that kind of testimony is required.

[3] This is not to say, of course, that live-witness testimony is always or even usually more reliable or dependable than inanimate evidence. Indeed, just the opposite may be true. But a determination that the discovery of certain evidence is sufficiently unrelated to or independent of the constitutional violation to permit its introduction at trial is not a determination which rests on the comparative reliability of that evidence. At-

tenuation analysis, appropriately concerned with the differences between live-witness testimony and inanimate evidence, can consistently focus on the factors enumerated above with respect to the former, but on different factors with respect to the latter.

[4, 5] In holding that considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a factor in the attenuation analysis, we do no more than reaffirm an observation made by this Court half a century ago:

> "A criminal prosection is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire v. United States*, 273 U.S. 95, 99, 47 S.Ct. 259, 260, 71 L.Ed. 556 (1927).

The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

III

[6] Viewing this case in the light of the principles just discussed, we hold that the Court of Appeals erred in holding that the degree of attenuation was not sufficient to dissipate the connection between the illegality and the testimony. The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of Biro's discovery of the policy slips. Nor were the slips themselves

used in questioning Hennessey. Substantial periods of time elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the latter and the testimony at trial on the other. While the particular knowledge to which Hennessey testified at trial can be logically traced back to Biro's discovery of the policy slips both the identity of Hennessey and her relationship with the respondent was well known to those investigating the case. There is in addition, not the slightest evidence to suggest that Biro entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent. Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro. The cost of permanently silencing Hennessey is too great for an even-handed system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect.

[7] Obviously no mathematical weight can be assigned to any of the factors which we have discussed, but just as obviously they all point to the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. The judgment of the Court of Appeals is accordingly

Reversed.

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

Mr. Chief Justice BURGER, concurring in—he judgment.

I agree with the Court's ultimate conclusion that there is a fundamental difference, for purposes of the exclusionary rule, between live-witness testimony and other types of evidence. I perceive this distinction to be so fundamental, however, that I would not prevent a factfinder from hearing and considering the relevant statements of any witness, except perhaps under the most remarkable of circumstances — although none such have ever been postulated that would lead me to exclude the testimony of a live witness.

To appreciate this position, it is essential to bear in mind the purported justification for employing the exclusionary rule in a Fourth Amendment context: deterrence of official misconduct. See *Stone v. Powell,* 428 U.S. 465, 486, 96 S.Ct. 3037, 3047, 49 L.Ed.2d 1067 (1976); *United States v. Janis,* 428 U.S. 433, 458-459, n. 35, 96 S.Ct. 3021, 3034, 49 L.Ed.2d 1046 (1976). As an abstract intellectual proposition this can be buttressed by a plausible rationale since there is at least some comprehensible connection — albeit largely and dubiously speculative — between the exclusion of evidence and the deterrence of intentional illegality on the part of a police officer.[1] But if that is the purpose of the rule, it seems to

[1]Empirically speaking, though, I have the gravest doubts as to whether the exclusion of evidence, in and of itself, has any direct appreciable effect on a policeman's behavior in most situations — emergency actions in particular. See *Bivens, v. Six Unknown Federal Agents,* 403 U.S. 388, 416-417, 426-427, 91 S.Ct. 1999, 2014-2015, 2019-2020, 29 L.Ed.2d 619 (1971) (Burger, C. J., dissenting).

me that the appropriate inquiry in every case in which a defendant seeks the exclusion of otherwise admissible and reliable evidence is whether official conduct in reality will be measurably altered by taking such a course.

On the facts of this case the Court is, of course, correct in holding that the "[a]pplication of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro." *Ante,* at 1062. Reaching this result, however, requires no judicial excursion into an area about which "philosophers have been able to argue endlessly,"[2] namely, the degree of "free will" exercised by a person when engaging in an act such as speaking.

In the history of ideas many thinkers have maintained with persuasion that there is no such thing as "free will," in the sense that the term implies the independent ability of an actor to regulate his or her conduct. Others have steadfastly maintained the opposite, arguing that the human personality is one innately free to choose among alternatives. Still a third group would deny that the very term "free will" has coherent meaing. These are only a few of the many perspectives on a subject which lies at the core of our intellectual and religious heritage. While this ancient debate will undoubtedly continue, "society and the law have no choice in the matter. We must proceed, on the scientifically unprovable assumption that human beings make choices in the regulation of their conduct and that they are influenced by society's standards as well as by personal standards." *Blocker v. United States,* 110 U.S.

[2]J. Sartre, Being and Nothingness 433 (Barnes trans. 1956).

App.D.C. 41, 53, 288 F.2d 853, 865 (1961) (Burger, J., concurring). Mr. Justice Jackson expressed this in *Gregg Cartage & Storage Co. v. United States,* 316 U.S. 74, 62 S.Ct. 932, 86 L.Ed. 1283 (1942): "the practical business of government and administration. . . .

We are nonetheless cognizant to the fact that this assumption must continually confront the inherent practical obstacle of one person being unable to know with certainty the content of another's mind. We cross this barrier daily, of course, in the process of determining criminal culpability.[3] Yet in criminal trials we are willing to bear the risk of error — substantially diminished by the requirement of proof beyond a reasonable doubt — in order to effectuate the common law tradition of imposing punishment only upon those who can be said to be morally responsible for their acts. There is no analogue to this concern, however, in the area of Fourth Amendment exclusion, which has an admitted pragmatic purpose — based as I suggested on speculative hypotheses which ought to lead us to apply it with reasoned discrimination, not as an automatic response. In short, the results achieved from current exclusionary rule standards are bizarre enough without steering the analysis in the direction of areas which offer no reasonable hope of a comprehensible framework for inquiry.

[3]A somewhat similar hurdle is presented in civil cases, which may rest decision on the standard of a "reasonable man's" actions. In those circumstances we assume that a person is ordinarily capable of conforming conduct to an objective standard of reasonableness. Consequently, while the *assumption* is indulged that the person possesses control over his actions, there is generally no need to inquire into mental processes as such.

It would be obvious nonsense to postulate that during his brief encounter in the florist shop Officer Biro was making a painstaking analysis of the extent to which Lois Hennessey's "free will" would affect her disposition to testify against respondent at some future point. It is one thing to engage in scholastic hindsight, particularly as the dissent had done here, in which speculation proceeds from unfounded hypotheses as to the *probable* explanations for the decision of a live witness to come forward and testify. But it is quite another to suppose that the police officer, assuming he is contemplating illegal action, will, or would be able to, engage in a similar inquiry.

There are several reasons which support this analysis, which, I might add is found acceptable in every other legal system in the world. Initially, I would point out that the concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct. The officer must be cognizant of at least the possibility that his actions — because of possible suppression — will undermine the chances of convicting a known criminal. I strongly suspect that in the vast majority of instances in this setting the officer accused of a Fourth Amendment violation will not even be remotely aware of the existence of a witness, as for example, where seizure of an item of evidence guides official inquiry to an eye witness. Of course , an officer conducting a search later held illegal may have some hope that his inquiry will lead to persons who can come forward with testimony. It is not plausible, however, that a police officer would consciously engage in illegal action simply to gain access to a witness, knowning full well that under

prevailing legal doctrine the result will be the certain exclusion of whatever tangible evidence might be found.[4]

Even if we suppose that the officer suspects that his illegal actions will produce a lead to a witness, he faces the intractable problem of understanding how valuable that person will be to his investigation. As one philosopher has aptly put the matter, "[t]he freedom of the will consists in the impossibility of knowing actions that still lie in the future." L. Wittgenstein, Tractatus Logico-Philosophicus ¶5.1362 (Pears & McGuinness trans. 1961). In *Smith v. United States*, 117 U.S.App.D.C. 1, 4, 324 F.2d 879, 881 (1963), cert. denied, 377 U.S. 954, 84 S.Ct. 1632, 12 L.Ed.2d 498 (1964), this point was applied to the case of a live witness testifying under oath:

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to the police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and voli-

[4]Perhaps a case might arise in which the police conducted a search only for the purpose of obtaining the names of witnesses. In such a circumstance it is possibly arguable that the exclusion of any testimony gained as a result of the search would have an effect on official behavior. This clearly did not occur here, nor would. In any event, the decision to exclude such testimony should depend on the *officers'* motivation and not on the "free will" of the witnesses. I would not want to speculate, however, as to whether such an unlikely case would justify modifying a *per se* approach to this general problem.

tion interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a [living] *witness* from the relative immutability of inanimate evidence." (Emphasis added.)

It can, of course, be argued, that the prospect of finding a helpful witness may play *some* role in a policeman's decision to be indifferent about Fourth Amendment procedures. The answer to this point, however, is that we have never insisted on employing the exclusionary rule whenever there is some possibility, no matter how remote, of deterring police misconduct. Rather, we balance the cost to society of losing perfectly competent evidence against the prospect of incrementally enhancing Fourth Amendment values. See, *e. g., Stone, supra*, 428 U.S. at 486, 96 S.Ct. at 3047; *United States v. Calandra*, 414 U.S. 338, 350-351, 94 S.Ct. 613, 621, 38 L.Ed.2d 561 (1974); *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 966-977, 22 L.Ed.2d 176 (1969).

Using this approach it strikes me as evident that the permanent silencing of a witness — who, after all, is appearing under oath — is not worth the high price the exclusionary rule exacts. Any rule of law which operates to keep an eye witness to a crime — a murder, for example — from telling the jury what that person saw has a rational basis roughly comparable to the primitive rituals of human sacrifice.

I would, therefore, resolve the case of a living witness on a *per se* basis, holding that such testimony is always admissible, provided it meets all other traditional evidentiary requirements. At very least this

solution would alleviate the burden — now squarely thrust upon courts — of determining in each instance whether the witness possessed that elusive quality characterized by the term "free will."

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

While "reaffirm[ing]" the holding of *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963), that verbal evidence, like physical evidence, may be "fruit of the poisonous tree," the Court today "significantly qualif[ies]" *Wong Sun's* further conclusion, *id.*, at 486, 83 S.Ct. at 416, that no "logical distinction" can be drawn between verbal and physical evidence for purposes of the exclusionary rule. *Ante*, at 1059. In my view, the distinction that the Court attempts to draw cannot withstand close analysis. To extend "a time-worn metaphor," *Harrison v. United States*, 392 U.S. 219, 222, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968), I do not believe that the same tree, having its roots in an unconstitutional search or seizure, can bear two different kinds of fruit, with one kind less susceptible than the other to exclusion on Fourth Amendment grounds. I therefore dissent.

The Court correctly states the question before us: whether the connection between the police officer's concededly unconstitutional search and Hennessey's disputed testimony was "so attenuated as to dissipate the taint," *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939). See *ante*, at 1059. In resolving questions of attenuation, courts typically scrutinize the facts of the individual case, with particular attention to such matters as the "temporal prox-

imity" of the official illegality and the discovery of the evidence, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Brown v. Illinois,* 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2262, 45 L.Ed.2d 416 (1975). The Court retains this general framework, but states that "[a]ttenuation analysis" should be "concerned with the differences between live-witness testimony and inanimate evidence." *Ante,* at 1061. The differences noted by the Court, however, have to a large extent already been accommodated by current doctrine. Where they have not been so accommodated, it is because the differences asserted are either illusory or of no relevance to the issue of attenuation.

One difference mentioned by the Court is that witnesses, unlike inanimate objects, "can, and often do, come forward and offer evidence entirely of their own volition." *Id.,* at 1060. Recognition of this obvious fact does nothing to advance the attenuation inquiry. We long ago held that, if knowledge of evidence is gained from a source independent of police illegality, the evidence should be admitted. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920) (Holmes, J.). This "independent source" rule would plainly apply to a witness whose identity is discovered in an illegal search but who later comes to the police for reasons unrelated to the official misconduct. In the instant case, however, as the Court recognizes, *ante,* at 1058, there is a " 'straight and uninterrupted' " road between the illegal search and the disputed testimony.

Even where the road is uninterrupted, in some cases the Government may be able to show that the illegally

discovered evidence would inevitably have come to light in the normal course of a legal police investigation. Assuming such evidence is admissible — a proposition that has been questioned, *Fitzapatrick v. New York,* 414 U.S. 1050, 94 S.Ct. 554, 38 L.Ed.2d 338 (1973) (White, J., dissenting from denial of certiorari) — this "inevitable discovery" rule would apply to admit the testimony of a witness who, in the absence of police misconduct, would have come forward "entirely of [his or her] own volition." Again, however, no such situation is presented by this case, since the Court accepts the findings of the two lower courts that Hennessey's testimony would not inevitably have been discovered. *Ante,* at 1058-1059.

Both the independent source and inevitable discovery rules, moreover, can apply to physical evidence as well as to verbal evidence. The police may show, for example, that they learned from an independent source, or would inevitably have discovered through legal means, the location of an object that they also knew about as a result of illegal police activity. It may be that verbal evidence is more likely to have an independent source, because live witnesses can indeed come forward of their own volition, but this simply underscores the degree to which the Court's approach involves a form of judicial "double counting." The Court would apparently first determine whether the evidence stemmed from an independent source or would inevitably have been discovered; if neither of these rules were found to apply, as here, the Court would still somehow take into account the fact that, as a general proposition (but not in the particular case), witnesses sometimes do come forward of their own volition.

The Court makes a related point that "[t]he greater the willingness of the witness to freely testify . . . the smaller the incentive to conduct an illegal search to discover the witness." *Ante,* at 1060. The somewhat incredible premise of this statement is that the police in fact refrain from illegal behavior in which they would otherwise engage because they know in advance both that a witness will be willing to testify and that he or she "will be discovered by legal means." *Ibid.* This reasoning surely reverses the normal sequence of events; the instances must be very few in which a witness' willingness to testify is known before he or she is discovered. In this case, for example, the police did not even know that Hennessey was a potentially valuable witness, much less whether she would be willing to testify, prior to conducting the illegal search. See *id.*, at 1062. When the police are certain that a witness "will be discovered by legal means," *id.*, at 1060 — if they ever can be certain about such a fact — they of course have no incentive to find him or her by illegal means, but the same can be said about physical objects that the police know will be discovered legally.

The only other point made by the Court is that exclusion of testimony "perpetually disable[s] a witness from testifying about relevant and material facts." *Ante,* at 1061. The "perpetual . . . disable[ment]" of which the Court speaks, however, applies as much to physical as to verbal evidence. When excluded, both types of evidence are lost for the duration of the particular trial, despite their being "relevant and material . . . [and] unrelated . . . to the purpose of the originally illegal search." *Ibid.* Moreover, while it is true that "often" the exclusion of testimony will be very costly to society, *id.*, at 1061, at least as often the exclusion of

physical evidence — such as heroin in a narcotics possession case or business records in a tax case — will be as costly to the same societal interests. But other, more important societal interests, see *Brown v. Illinois, supra,* 422 U.S., at 599-600, 95 S.Ct. at 2259-2260; *Wong Sun v. United States, supra,* 371 U.S., at 486, 83 S.Ct. at 416, have led to the rule, which the Court today reaffirms, that "fruits of the poisonous tree" must be excluded despite their probative value, unless the facts of the case justify a finding of sufficient attenuation.

The facts of this case do not justify such a finding. Although, as the Court notes, *ante,* at 1058; see *id.*, at 1062, four months elapsed between the illegal search and the FBI's first contact with Hennessey, the critical evidence was provided at the time and place of the search, when the police officer questioned Hennessey and she identified respondent, *id.*, at 1057. The time that elapsed thereafter is of no more relevance than would be a similar time period between the discovery of an object during an illegal search and its later introduction into evidence at trial. In this case, moreover, there were no intervening circumstances between Hennessey's statement at the time of the search and her later testimony. She did not come to the authorities and ask to testify, despite being a student of police science; an FBI agent had to go to her home and interrogate her. *Id.*, at 1058.

Finally, whatever the police officer's purpose in the flower shop on the day of the search, the search itself was not even of arguable legality, as was conceded by the Government below. 542 F.2d 136, 140 n. 5 (CA2 1976). It is also undisputed that the shop had been under surveillance as part of an ongoing gambling in-

vestigation in which the local police force had actively participated; its participaiton included interception of at least one of respondent's telephone conversations in the very month of the search. *Ante,* at 1058, and n.2. Under all of the circumstances, the connection here between the official illegality and the disputed testimony cannot be deemed "so attenuated as to dissipate the taint." The District Court therefore properly excluded the testimony.

I would affirm the judgment of the Court of Appeals.